

THE PROTECTION OF ALIENS FROM DISCRIMINATION  
AND WORLD PUBLIC ORDER: RESPONSIBILITY OF  
STATES CONJOINED WITH HUMAN RIGHTS \*

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The deprivations with which we are here concerned are those imposed upon individuals on the ground that they do not possess the "nationality" of the imposing state. By nationality we refer to the "characterizations" states make of individuals for the purpose of controlling and protecting them for the many comprehensive concerns of states.<sup>1</sup> Since the larger transnational community honors states in the conferment and withdrawal of "nationality" upon many different grounds—including place of birth, blood relation, subjective identification of individuals, and various activities—these characterizations may bear little relation to the actual facts of particular community membership and, hence, to reasonable differentiations in terms of common interest in the larger community of mankind. It is our thesis that most deprivations imposed through these characterizations are made unlawful, not merely by the historic law of the responsibility of states, but also by a newly emerged general norm of nondiscrimination which seeks to forbid all generic differentiations among people in access

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<sup>1</sup> The concept of "nationality" is often reified into a pseudoabsolute comparable to "title," with considerable normative ambiguity. For an attempt at clarification, see McDougal, Lasswell, & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L. J. 901 (1974), especially at 901-03, wherein relevant references are indicated. It may be recalled that stateless persons are not only aliens but may because of the lack of a protector be subjected to more severe deprivations. See *id.* at 902, 960-62.

In her recent study, the Baroness Elles employs the term "alien" to designate "an individual over whom a states [sic] has no jurisdiction, and no link exists between the individual and the state except in so far as the individual may be within the territory of that state." Elles, *Aliens and Activities of the United Nations in the Field of Human Rights*, 7 HUMAN RIGHTS J. 291, 296 (1974). This would appear inadequate and confusing. The comprehensive and continuing claims states make about individuals under the concept of "nationality" are quite different from the occasional and limited claims they make under the concept of "jurisdiction." The claims states make in relation to aliens under "jurisdiction" are, furthermore, quite extensive, and the "links" that may exist between an alien and a state may include much more than residence. Cf. *Nottebohm case*, [1955] ICJ REP. 4.

to value shaping and sharing for reasons irrelevant to individual capabilities and contribution.<sup>2</sup>

## I.

### FACTUAL BACKGROUND

Deprivations imposed upon aliens extend far back in history and have their roots deep in primitive suspicions and fears of the outsider. Dawson and Head elaborate certain traditional perspectives:

Since ancient times foreigners have been regarded with suspicion, if not fear, either due to their nonconforming religious and social customs, their assumed inferiority, or because they were considered potential spies and agents of other nations. Thus, the Romans refused aliens the benefits of the *jus civile*, thirteenth-century England limited their recourse to the ordinary courts of justice, and imperial Spain denied them trading rights in the New World.<sup>3</sup>

Even in the contemporary emerging world society, with its ever increasing personal mobility and transnational interactions, the non-national is still often assimilated with difficulty in the minutiae of the social processes of particular communities.

Among a wide range of value deprivations still imposed upon aliens, perhaps the most important is denial of full participation in the making of community decisions. In a world largely organized by nation-states, differences in allegiance remain fundamental, and it is in the power process that the sharpest distinctions are drawn between nationals and non-nationals. Aliens are thus commonly denied access to voting and office-holding (appointive and elective alike).<sup>4</sup> They may be exempted from "the rights incident to citizenship, such as military service, jury ser-

<sup>2</sup> For detailed elaboration of the general norm of nondiscrimination, see McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U. L. REV. 919, 1034-86 (1975) [hereinafter cited as *The Protection of Respect and Human Rights*]; McDougal, Lasswell, & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AJIL 497 (1975); McDougal, Lasswell, & Chen, *Non-Conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination*, 2 YALE STUDIES IN WORLD PUBLIC ORDER 1 (1975); McDougal, Lasswell, & Chen, *The Human Rights of the Aged: An Application of the General Norm of Non-Discrimination*, 28 U. FLA. L. REV. No. 3 (Summer 1976, forthcoming); McDougal, Lasswell, & Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Non-Discrimination*, 74 MICH. L. REV. No. 5 (April 1976); McDougal, Lasswell, & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, 1 So. LL. U.L.J. 1151 (1976).

<sup>3</sup> F. DAWSON & I. HEAD, *INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* xi (1971).

<sup>4</sup> See E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* 63-64 (1922); A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 510-11 (1938).

In the United States, resident aliens, especially those who had formally declared their intention to become U.S. citizens, were at one time permitted to vote in 22 states. See M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 180 (1946); Terrace v. Thompson, 263 U.S. 197 (1923).

vice. . . ."<sup>5</sup> Aliens are commonly subjected to rigorous registration requirements and to harsh restrictions in regard to freedom of movement, both internally and transnationally.<sup>6</sup> Aliens may also be arbitrarily expelled.<sup>7</sup> Aliens may be hampered, for various reasons, in obtaining effective remedy for ordinary wrongs and may experience "denial of justice"<sup>8</sup>—including

<sup>5</sup> E. BORCHARD, *supra* note 4, at 63. See also W. DAVIES, *THE ENGLISH LAW RELATING TO ALIENS* 184-210 (1931).

<sup>6</sup> M. KONVITZ, *supra* note 4, at 1-45. Cf. generally J. INGLES, *STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY*, UN Doc. E/CN.4/Sub.2/220/Rev.1 (1963).

<sup>7</sup> See 6 A BRITISH DIGEST OF INTERNATIONAL LAW 83-241 (C. Parry ed. 1965); E. BORCHARD, *supra* note 4, at 48-63; I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 505-07 (2d ed. 1973); 3 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 690-705 (1942); M. KONVITZ, *supra* note 4, at 46-78; M. KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* 93-131 (1953); 2 D. O'CONNELL, *INTERNATIONAL LAW* 706-11 (2d ed. 1970); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 691-95 (8th ed. H. Lauterpacht ed. 1955); UNITED NATIONS, *STUDY ON EXPULSION OF IMMIGRANTS* (1955); P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 49-60 (1956); 1 M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 418-514 (1937); 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 620-22, 850-63 (1967); Puente, *Exclusion and Expulsion of Aliens in Latin America*, 36 AJIL 252, 257-70 (1942).

<sup>8</sup> The concept of "denial of justice" is of course frequently used not primarily for its factual reference but as a term of art to indicate a finding of state responsibility. The same cases, and their discussion in the literature, do, however, illustrate the factual deprivations imposed upon aliens. Sohn and Baxter seek to clarify this much-abused concept in these words:

This term [denial of justice] has in the past been used in at least three different senses. In its broadest sense, this term seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State toward aliens. In its narrowest sense, this term has been limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgment. In an intermediate sense, the expression "denial of justice" is employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions. The last appears to be the most apposite usage, since the term may thus be usefully employed to describe a particular type of international wrong for which no other adequate phrase exists in the language of the law.

F. GARCIA-AMADOR, L. SOHN, & R. BAXTER, *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 180 (1974). This book reproduces, in the first half, the draft articles on "Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens" and commentary thereon, with some minor changes, as excerpted from the six reports submitted by F. V. Garcia-Amador to the International Law Commission during the period 1956-1961 in his capacity as the Special Rapporteur on the subject of "State Responsibility." These six Reports are: *First Report*, [1956] 2 Y.B. INT'L L. COMM'N 173-231, UN Doc. A/CN.4/96 (1956) [hereinafter cited as *Garcia-Amador's First Report*]; *Second Report*, [1957] 2 Y.B. INT'L L. COMM'N 104-30, UN Doc. A/CN.4/106 (1957) [hereinafter cited as *Garcia-Amador's Second Report*]; *Third Report*, [1958] 2 Y.B. INT'L L. COMM'N 47-73, UN Doc. A/CN.4/111 (1958); *Fourth Report*, [1959] 2 Y.B. INT'L L. COMM'N 1-36, UN Doc. A/CN.4/119 (1959); *Fifth Report*, [1960] 2 Y.B. INT'L L. COMM'N 41-68, UN Doc. A/CN.4/125 (1960); *Sixth Report*, [1961] 2 Y.B. INT'L L. COMM'N 1-54, UN Doc. A/CN.4/134 and Add. 1 (1961). In the second half, the book reproduces the "Convention on the International Responsibility of States for Injuries to Aliens" (Final Draft with Explanatory Notes) prepared in 1961 by Louis B. Sohn and R. R. Baxter, as Reporters.

subjection to arbitrary arrest and detention, denial of access to appropriate tribunals, judicial or administrative, denial of fair hearing, and subjection to arbitrary decisions.<sup>9</sup>

Characteristic deprivations in the wealth process are scarcely less severe. Aliens may be restricted in the acquisition of land and other forms of property.<sup>10</sup> "The right to acquire immovables," wrote Borchard, "by purchase or descent, and to own and dispose of them may be forbidden to aliens."<sup>11</sup> Similarly, onerous restrictions may be imposed on "the property rights of aliens in certain national resources, *e.g.*, national vessels, national mines, and other kinds of property."<sup>12</sup> Aliens may be forbidden to engage in enumerated business enterprises. The wealth of aliens may be expropriated without adequate compensation;<sup>13</sup> movement of their assets may

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On denial of justice, *see generally* I. BROWNLIE, *supra* note 7, at 514-16; A. FREEMAN, note 4 *supra*; 2 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 909-17 (1945); 2 D. O'CONNELL, *supra* note 7, at 945-50; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 502-03, 534-48 (1965) [hereinafter cited as RESTATEMENT]: De Arechaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 531, 553-57 (M. Sørensen ed. 1968); Eagleton, *Denial of Justice in International Law*, 22 *AJIL* 538 (1928); Fitzmaurice, *The Meaning of the Term "Denial of Justice,"* 13 *B. Y. INT'L L.* 93 (1932); Spiegel, *Origin and Development of Denial of Justice*, 32 *AJIL* 63 (1938).

<sup>9</sup> Cf. F. DAWSON & I. HEAD, note 3 *supra*; A. FREEMAN, note 4 *supra*; F. GARCIA-AMADOR, L. SOHN & R. BAXTER, *supra* note 8, at 179-99; 2 C. HYDE, *supra* note 8, at 924-36.

<sup>10</sup> *See* E. BORCHARD, *supra* note 4, at 87; 1 C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* 1-122.1-1-123 (rev. ed. 1975); M. KONVITZ, *supra* note 4, at 148-52; McGovney, *The Anti-Japanese Land Laws*, 35 *CALIF. L. REV.* 61 (1947); Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 *TEMP. L. Q.* 15 (1962).

The Mexican laws regarding aliens' rights to acquire real property are described as "lush, barren, cragged, flat, solemn, capricious, gnarled, slashed, smoothed and painted. . . ." *Quoted in Comment, Do We Live in Alien Nations?*, 3 *CALIF. WESTERN INT'L L. J.* 75, 83 (1972). For more details, *see id.* at 83-94.

For charts showing limitations on the acquisition of land imposed on aliens (individuals and corporations) by various states of the United States, *see id.* at 95-111.

<sup>11</sup> E. BORCHARD, *supra* note 4, at 86.

<sup>12</sup> *Id.* at 91.

<sup>13</sup> For comprehensive reference, *see* Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry*, in 2 *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 36-182 (R. Falk & C. Black eds. 1970). *Cf. generally* K. CARLSTON, *LAW AND ORGANIZATION IN WORLD SOCIETY* (1962); *ESSAYS ON EXPROPRIATION* (R. Miller & R. Stanger eds. 1967); A. FATOUROS, *GOVERNMENT GUARANTEES TO FOREIGN INVESTORS* (1962); I. FOIGHEL, *NATIONALIZATION AND COMPENSATION* (1964); W. FRIEDMANN, *EXPROPRIATION IN INTERNATIONAL LAW* (1953); R. LILLICH, *THE PROTECTION OF FOREIGN INVESTMENT* (1965); R. LILLICH, *INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE* (1967); E. MOONEY, *FOREIGN SEIZURES—SABBATINO AND THE ACT OF STATE DOCTRINE* (1967); *RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD* (International and Comparative Law Center, The Southwestern Legal Foundation ed. 1965); *SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS* (International and Comparative Law Center, The Southwestern Legal Foundation ed. 1964); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 408-91 (2d ed. 1976); *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* (vols. 1-3) (R. Lillich ed. 1972-75); B. WESTON, *INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE* (1971); G. WHITE, *NATIONALISATION OF FOREIGN*

be curtailed. They may even be prohibited from gainful employment, and be condemned therefore to lead a precarious existence.<sup>14</sup> Aliens may further be excluded from enjoying such welfare benefits as "relief, public works, public housing, old-age assistance."<sup>15</sup> Closely allied deprivations relate to the exercise of professional skills, as when aliens are excluded from a wide range of professions and occupations, including the practice of law, medicine, dentistry, pharmacy, public accounting, architecture, and teaching.<sup>16</sup>

When handicapped by a different mother tongue, aliens may enjoy limited opportunities for education, and financial aid and other assistance may be withheld. Opportunities to shape enlightenment by owning and editing mass media of communication are generally restricted. Aliens may be prevented from marrying nationals because of the inhibiting con-

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PROPERTY (1961); B. WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* (1959); Dawson & Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation*, 30 *FORDHAM L. REV.* 727 (1962); Lowenfeld, *Reflections on Expropriation and the Future of Investment in the Americas*, 7 *INT'L LAWYER* 116 (1973); MANN, *Outlines of a History of Expropriation*, 75 *L. Q. REV.* 188 (1959); Metzger, *Property in International Law*, 50 *VA. L. REV.* 594 (1964); *Nationalization*, 14 *HARV. INT'L L. J.* 378 (1973).

<sup>14</sup> As Borchard wrote: "The labor of aliens is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation." E. BORCHARD, *supra* note 4, at 186. "An alien cannot live," he added, "where he cannot work." *Id.* at 187.

Cf. W. GIBSON, *ALIENS AND THE LAW* 119-43 (1940); Das, *Discrimination in Employment against Aliens—The Impact of the Constitution and Federal Civil Rights Laws*, 35 *U. PITT. L. REV.* 499 (1974); *Comment, Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens*, 1970 *UTAH L. REV.* 136; *Note, Constitutionality of Restrictions on Aliens' Right to Work*, 57 *COLUM. L. REV.* 1012 (1957); *Note, Protection of Alien Rights Under the Fourteenth Amendment*, 1971 *DUKE L. J.* 583 [hereinafter cited as *Note on Protection of Alien Rights*].

<sup>15</sup> E. BORCHARD, *supra* note 4, at 186. See also UNITED NATIONS, *STUDY ON ASSISTANCE TO INDIGENT ALIENS*, UN Doc. ST/SOA/7 (1951); *Note, State Discrimination against Mexican Aliens*, 38 *GEO WASH. L. REV.* 1091 (1970).

<sup>16</sup> For a lengthy itemization of occupations that were once denied aliens in the United States, see M. KONVITZ, *supra* note 4, at 190-211. Cf. E. BORCHARD, *supra* note 4, at 80; 1 C. GORDON & H. ROSENFELD, *supra* note 10, at 1-118-1-120; Branse, *State Laws Barring Aliens from Professions and Occupations*, 3 *INS MONTHLY REV.* 281 (March 1946); Cliffe, *Aliens: The Unconstitutional Classification for Admission to the Bar*, 4 *ST. MARY'S L. J.* 181 (1972); Sanders, *Aliens in Professions and Occupations—State Laws Restricting Participation*, 16 *IN REPORTER* 37 (1968); *Comment, Constitutional Protection of Aliens*, 40 *TENN. L. REV.* 235, 245-53 (1973).

Within the United States, community expectations and practices appear to be changing more favorably towards aliens. See *In Re Griffiths*, 413 *U.S.* 717 (1973); Gordon, *The Alien and the Constitution*, 9 *CALIF. WESTERN L. REV.* 1 (1972); Miller & Steele, *Aliens and the Federal Government: A Newer Equal Protection*, in *IMMIGRATION, ALIENAGE AND NATIONALITY* 1-31 (1975) (*UCD L. REV.* vol. 8); *Note on Protection of Alien Rights*, *supra* note 14; *Recent Decisions—Constitutional Law—Rights of Aliens—Citizenship as a Requirement for Admission to the Bar is a Violation of Equal Protection*, 4 *GA. J. INT'L & COMP. L.* 206 (1974).

Cf. also Christol & Bader, *Legal Rights of the Alien in Austria with Special Reference to the United States Citizen*, 7 *INT'L LAWYER* 289 (1973).

sequences of involuntary acquisition or loss of nationality,<sup>17</sup> and are therefore handicapped in the shaping and sharing of affection. In some states, the rights of non-nationals in adoption and guardianship are curtailed.<sup>18</sup> The access of aliens to health facilities and services is generally less than that of nationals, and housing often presents difficult problems. Even the lives of aliens may be threatened by mob actions, inspired by xenophobia; and in many communities alienage remains a stigma of disrespect, affecting many civil liberties.<sup>19</sup>

## II.

### BASIC COMMUNITY POLICIES

In a global society aspiring towards the utmost freedom of choice for individuals in matters of group affiliation, residence, movement, access to value processes, and so on, differentiation upon the ground of alienage is scarcely less invidious to human dignity values than discrimination based upon race, sex, and religion.<sup>20</sup> A unique feature of deprivations imposed upon the ground of alienage is, further, that they commonly involve high degrees of transnational impact. The reference of the generic label "aliens" is not to some static isolated group, but potentially to the whole of humanity. Every individual is a potential alien in relation to all the states of which he is not a national; to the extent that he moves and engages in

<sup>17</sup> See McDougal, Lasswell, & Chen, *supra* note 1, at 922-23, 939-40, 973-74. See also UNITED NATIONS, NATIONALITY OF MARRIED WOMEN (1963); UNITED NATIONS, CONVENTION ON THE NATIONALITY OF MARRIED WOMEN (1962); W. WALTZ, THE NATIONALITY OF MARRIED WOMEN (1937). <sup>18</sup> E. BORCHARD, *supra* note 4, at 91.

<sup>19</sup> In the words of Dunn:

. . . the simple fact that he is a foreigner may often be a determining factor in the kind of treatment he receives at the hands of private individuals or government officials. Prejudice against aliens as such is still a pervasive trait of human nature.

F. DUNN, THE PROTECTION OF NATIONALS 36 (1932).

It may be noted that the vulnerability of the alien to severe deprivations in the host community is, of course, particularly acute at a time of high crisis, as exemplified by the extremely harsh treatment accorded "enemy aliens." The treatment of enemy aliens raises very special policy problems in relation to state security, which cannot be dealt with in this article. See M. DOMKE, THE CONTROL OF ALIEN PROPERTY (1947); M. DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943); F. LAFITTE, THE INTERNMENT OF ALIENS (1940); M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 89-91 (1961); 2 D. O'CONNELL, *supra* note 7, at 769-73; S. RUBIN, PRIVATE FOREIGN INVESTMENTS 57 ET SEQ. (1956); Borchard, *The Treatment of Enemy Property*, 34 GEO. L. J. 389 (1946); CARLSTON, *Return of Enemy Property*, 52 ASIL PROC. 53 (1958); Jessup, *Enemy Property*, 49 AJIL 57 (1955); Sommerich, *A Brief against Confiscation*, 11 LAW & CONTEMP. PROB. 152 (1945).

<sup>20</sup> See note 2 *supra*.

The United States Supreme Court, in outlawing state statutes denying welfare benefits to aliens, declared in *Graham v. Richardson* that

classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate.

403 U.S. 365, 372 (1971) (footnotes omitted).

activities across state boundaries, this potentiality becomes an actuality. It was with deep insight that many years ago Dunn characterized the problem of such deprivations as "an intricate and continuing international" one "ultimately concerned with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems, and varying degrees of physical power and prestige."<sup>21</sup>

It must be conceded that the aggregate common interest of territorially organized communities may upon occasion require some limitation of this preferred policy of the utmost individual freedom of choice in state membership and complete equality in the treatment of aliens and nationals. Insofar as the characterizations of "nationality" made by states bear some rational relation to group memberships in fact, it may be expedient for states to make appropriate differentiations for the sake of internal and external security and the optimal functioning of all internal value processes.<sup>22</sup> The perspective of human dignity requires that concessions to the organized interests of territorial communities should, however, be kept to a minimum. The more important differential treatments that may be held permissible upon grounds of alienage would appear to be confined to those that relate to participation in the making of community decisions (voting and office-holding). In longer-term perspective, as increasing interactions build more pluralized and regional territorial structures for the world, accompanied by the attrition of anachronistic national barriers, even such residual concessions to territoriality would presumably become functionless and unnecessary.

As a guide to the task of distinguishing deprivations imposed upon aliens that are rationally related to common interest and therefore permissible from those that are impermissible, Dunn proposed a formulation in terms of allocation of risk. He affirmed that "a workable test can only be arrived at by giving consideration to the general purpose of the notion of international responsibility in connection with injuries to foreigners" and found that purpose in maintenance of "the minimum conditions which are regarded as necessary for the continuance of international trade and intercourse."<sup>23</sup> "Normal business and social relationships"<sup>24</sup> were capable of bearing a certain degree of risk of "abuses of governmental power by individual officials and employees,"<sup>25</sup> but there was a point beyond which, Dunn found, such relationships could not carry on. Hence, he concluded, the appropriate question is:

. . . does the delinquency of a particular official indicate a failure on the part of the state to establish governmental organs capable of maintaining the minimum conditions necessary for the carrying on of

<sup>21</sup> F. DUNN, *supra* note 19, at 1.

<sup>22</sup> Cf. McDougal, Lasswell, & Chen, *supra* note 1, at 903-05.

<sup>23</sup> F. DUNN, *supra* note 19, at 133.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

normal social and business relations? If it does, then the state assumes the risk, otherwise not. Or the question might be put in another way. Is the delinquency of a type which, if permitted to occur generally, would make the conduct of customary social and business relations impossible? One might express this in familiar language by saying that a state is "under a duty" to provide conditions of this character, and that if it fails in this duty, then it becomes liable to make reparation.<sup>26</sup>

The difficulty with this test, whether confined to deprivations related to abuses of official power or extended to all legislative differentiation of aliens, is that it offers no detailed criteria for the allocation of risk or for evaluating costs and benefits in terms of the value consequences of different options in decision. When proffered and applied without guiding criteria the concept of "risk allocation" is no more than a tautologous, question-begging formula. There would appear no rational escape in relation to the problems of aliens, as of other problems, from the necessity of an explicit postulation of goals and a careful contextual analysis, with respect to every particular problem, of the inclusive interests of the larger community in a world society, the exclusive interests of the particular territorial communities in protecting their internal integrity or their nationals, and the interests of individual human beings in all basic rights.

The more fundamental policies which should be postulated, and made to infuse all decisions, for appraisal of particular instances of differentiation between aliens and nationals are of course those embodied in the contemporary human rights prescriptions, designed to reflect the common interests of the peoples of the world as individuals.<sup>27</sup> The fact of alienage does not change the fundamental demands and interests of the individual as a human being; its only relevance must be to the organized interests of a territorial community which, in varying contexts, his activities may affect. It is widely recognized today that many, if not most, "national" boundaries are highly artificial and anachronistic from any functional perspective, impeding a rational regional organization of the world, and, as suggested above, that the grounds commonly employed by states in making their characterizations of "nationality" may bear only an accidental relation to the facts of community membership.<sup>28</sup> In this context, the necessities of an aggregate common interest in a global economy and society, requiring a more rational relation of peoples to resources, should be made to yield as little as possible to the demands and practices of an outmoded and destructive nationalism. A clear consciousness of interdependence offers more hope even for shared exclusive interests than the amnesia of parochialism.<sup>29</sup>

<sup>26</sup> *Id.* at 134.

<sup>27</sup> See notes 93-132 *infra* and accompanying text.

<sup>28</sup> See McDougal, Lasswell, & Chen, note 1 *supra*. The imposition of deprivations by such a flexible group label may reflect the utmost arbitrariness.

<sup>29</sup> *Cf. id.* at 901-05, 993-98; F. DUNN, *supra* note 19.

## III.

## TRENDS IN DECISION

In ancient times the alien was commonly looked upon as an enemy and hence treated as an outlaw;<sup>30</sup> parochial community expectations kept him powerless and unprotected. As the Roman empire expanded, aliens were gradually accorded protection under the *jus gentium*, a law made applicable to foreigners as well as citizens, as distinguished from the *jus civile* which applied exclusively to Roman citizens.<sup>31</sup> The earlier harsh treatment of aliens was further, theoretically at least, ameliorated with the spread of the Christian idea of the unity of mankind.<sup>32</sup> In the feudal period, "the disabilities of the alien became more clearly defined," though such "disabilities and restrictions differed in degree in different baronies."<sup>33</sup> In the words of Dawson and Head:

In the early Middle Ages international commerce was so structured that few people lived abroad. Those persons that did had few real rights. In some places they could be treated as serfs and almost everywhere they could not pass property by inheritance. As trade and commerce expanded in the later Middle Ages, the position of foreigners improved, mostly due to increased protection given them by more powerful central governments against local feudal lords, and only quite incidentally to international agreement.<sup>34</sup>

With the coming of the modern nation-state system, a more humanitarian attitude toward aliens began to develop. The founding fathers of contemporary international law asserted that all persons, alien or other, were entitled to certain natural rights. Francisco de Vitoria was among the first to emphasize the importance of according aliens fair treatment.<sup>35</sup> Taking for granted the right of free access to territorial communities, Grotius considered it "essential to make the status of the foreigner coincide as far as possible with that of the subject of the particular State."<sup>36</sup> It was

<sup>30</sup> In the words of Goebel:

Very clearly, in the earliest times, the alien, as a clanless individual or outlaw, was without any of the existing personal rights. He had no "vergeld," he was not entitled to the peace and protection of the locality, and if by chance he enjoyed even liberty of person it was only by sufferance and in amelioration of the harsh laws which gave the local lord title over his person, as *ferae naturae*. How long these practices survived, we cannot say, but certainly the growth of a *Gastrecht* so common among primitive peoples was not long in superseding the ancient customs. This *Gastrecht*, or rights of hospitality, gave a certain quantum of protection to the foreigner and was exercised more particularly as a form of patronage of a lord over aliens.

Goebel, *The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrection and Civil Wars*, 8 AJIL 802, 803 (1914).

<sup>31</sup> E. BORCHARD, *supra* note 4, at 33; A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 25-26 (1949); Head, *The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada*, 2 CANADIAN Y. B. INT'L L. 107, 108 (1964).

<sup>32</sup> See A. ROTH, *supra* note 31, at 26.

<sup>33</sup> E. BORCHARD, *supra* note 4, at 34.

<sup>34</sup> F. DAWSON & I. HEAD, *supra* note 3, at 1.

<sup>35</sup> A. ROTH, *supra* note 31, at 27.

<sup>36</sup> *Id.* at 28. Cf. F. DUNN, *supra* note 19, at 46-48.

Vattel, however, who first expounded a coherent and influential doctrine for the protection of aliens.<sup>37</sup> Writing more than a century after Grotius, as mercantilism was being transformed into modern capitalism and as a vast European expansion overseas was beginning, Vattel created the theoretical basis for much subsequent decision. Viewing the state as an entity composed of the sovereign and his citizens, Vattel stressed that the state had a right to protect its citizens, wherever they might be. An injury to an individual alien was asserted to be an injury to the state of his nationality. In Vattel's words:

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.<sup>38</sup>

Ever since Vattel, and accompanying the spread of industrialization and European culture throughout the world, there has developed a unique customary international law for the special protection of aliens, built upon decisions from foreign office to foreign office, and in international and national tribunals, and fortified by the opinions of publicists and a vast network of relatively uniform treaties of "friendship, commerce, and navigation."<sup>39</sup> The identification Vattel makes of the interests of the state and

<sup>37</sup> 3 E. DE VATTEL, *CLASSICS OF INTERNATIONAL LAW: THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (C. Fenwick transl. 1916). The book was first published in 1758. Cf. P. REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL* (1960).

<sup>38</sup> 3 E. DE VATTEL, *supra* note 37, at 136.

Vattel's doctrine was quite precisely formulated by the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway case*:

[I]n taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to the intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.

[1939] P.C.I.J., ser. A/B, No. 76, at 16.

<sup>39</sup> On the international law of state responsibility, see generally C. AMERASINCHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967); W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 742-899 (3d ed. 1971); E. BORCHARD, note 4 *supra*; J. BRIERLY, *THE LAW OF NATIONS* 276-91 (6th ed. H. Waldock ed. 1963); *THE LAW OF NATIONS* 601-747 (H. Briggs ed. 2d ed. 1952) [hereinafter cited as H. BRIGGS]; I. BROWNIE, *supra* note 7, at 418-581; B. CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 161-253 (1953); F. DAWSON & I. HEAD, note 3 *supra*; C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 277-94 (P. Corbett transl. 1968); F. DUNN, note 19 *supra*; A. FREEMAN, note 4 *supra*; C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928); W. FRIEDMANN, O. LISSITZYN, & R. PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW* 745-879 (1969); F. GARCIA-AMADOR, L. SOHN, & R. BAXTER, note

of the alien individual has often been criticized as "fiction," as in some contexts it obviously is.<sup>40</sup> Like other "fictions feigned," however, this identification of state and individual interests has been found, by disinterested observers as well as by claimant parties, to represent in many contexts a close approximation to social reality. People always have been, and remain, important bases of power for territorial communities.<sup>41</sup> The security, in the sense of a minimum freedom from external violence and coercion, and the optimum order or quality of society, in the sense of the greater production and wider sharing of all values that any community can achieve, are intimately dependent upon the numbers and characteristics of its members, including their skills, capabilities, and loyalties. The conferring of a competence upon particular states to protect their members

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8 *supra*; INTERNATIONAL LAW IN THE TWENTIETH CENTURY 481-585 (L. Gross ed. 1969) [hereinafter cited as L. GROSS]; W. HOLDER & G. BRENNAN, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 629-709 (1972); P. JESSUP, A MODERN LAW OF NATIONS 94-122 (1968); C. JOSEPH, NATIONALITY AND DIPLOMATIC PROTECTION: THE COMMONWEALTH OF NATIONS (1969); M. KATZ & K. BREWSTER, THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS: CASES AND MATERIALS 6-398 (1960); N. LEECH, C. OLIVER, & J. SWEENEY, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 572-655 (1973); R. LILICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS (1962); R. LILICH & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION (1962); 6 J. MOORE, A DIGEST OF INTERNATIONAL LAW 605-1037 (1906); 2 D. O'CONNELL, *supra* note 7, at 693-719, 941-1025; 1. L. OPPENHEIM, *supra* note 7, at 335-69; RESTATEMENT, *supra* note 8, at 497-633; A. ROTH, note 31 *supra*; H. STEINER & D. VACTS, *supra* note 13, at 357-530; G. TUNKIN, THEORY OF INTERNATIONAL LAW 381-425 (W. Butler transl. 1974); Borchard, *Diplomatic Protection*, 5 ENCYC. SOC. SCIENCES 153 (1931); Copithorne, *State Responsibility and International Claims*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 207-28 (R. MacDonald, G. Morris, & D. Johnston eds. 1974); De Arechaga, note 8 *supra*; Garcia-Amador, *State Responsibility—Some New Problems*, 94 HAGUE RECUEIL DES COURS 365 (1958); Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AJIL SUPP. 131 (1929); Sweeney, *The Restatement of the Foreign Relations Law of the United States and the Responsibility of States for Injury to Aliens*, 16 SYRACUSE L. REV. 762 (1965).

For the work of the International Law Commission in regard to state responsibility, see Garcia-Amador's six Reports, note 8 *supra*, and Ago's Reports, note 92 *infra*.

<sup>40</sup> See, e.g., McDougal, Lasswell, & Chen, *supra* note 1, at 906-18; Koessler, *Government Espousal of Private Claims before International Tribunals*, 13 U. CHI. L. REV. 180 (1945).

<sup>41</sup> As Dunn incisively observed:

We think of the United States as an organized group of individuals occupying a particular spot of the earth's surface. Yet at any given moment, a vast number holding membership in that group are scattered all over the world, and an equally vast amount of their property, both real and personal, is situated in foreign jurisdictions. The same is true of all the other civilized nations of the world. Again, we conceive of the United States as a single economic unit. Yet if we trace the essential threads of that complicated fabric we find a surprisingly large proportion of them leading beyond the boundaries of the country to all parts of the world. If for any reason those threads should be cut, the effect upon the daily lives of all of us would be profound.

Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 166, 170 (1928).

See also McDougal, Lasswell, & Chen, *supra* note 1, at 901-05.

from injuries abroad may, thus, in a relatively unorganized world serve in many contexts to protect both the interests of the state in an important base of power and the interests of the alien individual in his basic human rights. In appropriate tribute, Judge Jessup describes the "history of this branch of international law during the nineteenth and twentieth centuries"<sup>42</sup> as exemplifying "the way in which a body of customary international law develops in response to the need for adjustment of clashing interests."<sup>43</sup> He adds that it "is remarkable that in this struggle which so generally involved the relations between the strong and the weak, international law, for all its primitiveness, developed as a balance for conflicting interests,"<sup>44</sup> and concludes that, "in terms of the modernization of international law:"<sup>45</sup>

The function of the law of responsibility of states for injuries to aliens . . . is to provide in the general world interest, adequate protection for the stranger, to the end that travel, trade, and intercourse may be facilitated.<sup>46</sup>

Within the broad, historic development of this unique customary international law for the protection of aliens, two different standards about the responsibility of states, both of which purport to include a norm prohibiting discrimination against aliens, have competed for general community acceptance. One of these standards is described as the doctrine of "national treatment" or "equality of treatment" and provides that aliens should receive equal, and only equal, treatment with nationals.<sup>47</sup> The second standard is described as that of a "minimum international standard" and specifies that, however a state may treat its nationals, there are certain minima in humane treatment that cannot be violated in relation to aliens.<sup>48</sup> A review of the flow of decision and communication in development of the customary law about aliens, and especially in the recent, more general prescriptions about human rights, will establish, it is believed, that the

<sup>42</sup> P. JESSUP, *supra* note 39, at 95.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Id.* at 96.

<sup>45</sup> *Id.* at 105.

<sup>46</sup> *Ibid.*

The observation of Dunn is equally illuminating:

From a practical point of view, the foreigner, although he may be accorded full civil rights on the same basis as citizens, is often at a disadvantage in any dispute which he may have with the agents of the state of his sojourn merely by reason of the fact that he is a foreigner. Furthermore, being deprived of political rights outside of his own country, he is not at liberty to participate in the determination of the social and economic order and has not the political means for the protection of his interests that are at the disposal of the citizen. Perhaps for these reasons as much as any other, it has been found necessary, in a world of diverse cultures and heterogeneous peoples, of strong governments and weak governments, of orderly countries and disorderly countries, to work out a common code of treatment of aliens in order that there might be some basis of security and predictability upon which to build the present complex structure of international intercourse.

Dunn, *supra* note 41, at 174.

<sup>47</sup> See notes 50-58 *infra* and accompanying text.

<sup>48</sup> For an excellent historical account, see Borchard, *The Minimum Standard of the Treatment of Aliens*, 38 MICH. L. REV. 445 (1940). For other discussions and documentation, see notes 59-82 *infra* and accompanying text.

second of these standards has become present general community expectation.<sup>49</sup>

It is seldom seriously asserted that states cannot differentiate between nationals and aliens in ways that bear a reasonable relation to the differences in their obligations and loyalties. Thus, states reciprocally honor each other in accepting the lawfulness of a great variety of differentiations in permissible access to territory, participation in government, the ownership of important natural resources, and so on. Yet the principle would appear almost universally accepted that with respect to participation in many important social processes states cannot discriminate against aliens in favor of nationals in ways that have no substantial basis in the differences in their obligations and loyalties.<sup>50</sup> Even the Latin American states are described as having laid "claim to a peculiar virtue in placing the alien on a footing of civil equality with the national;"<sup>51</sup> these states in fact exhibit a long history of constitutional and statutory enactment directed toward this end.<sup>52</sup> The perversion of this important general norm of non-discrimination has come, as Secretary of State Hull once pointed out, in taking a principle designed for the protection against inhumane treatment of the individual alien and transforming it into a formula designed to protect states from responsibility for arbitrary action.<sup>53</sup> One formulation of the "national treatment" doctrine propounded by many Latin Americans, and occasionally by others, is that an alien cannot expect a higher standard of treatment than a national, and hence a state cannot be held responsible under international law for any injury or damage suffered by an alien if he has been accorded the same treatment as nationals.<sup>54</sup> Thus, in the words of a leading proponent, Carlos Calvo:

Aliens who established themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection.<sup>55</sup>

<sup>49</sup> See notes 48-139 *infra* and accompanying text.

<sup>50</sup> Nondiscrimination is a principal objective of the treaties of friendship, commerce, and navigation. See R. WILSON, *UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW* 6 (1960).

In its Restatement of Foreign Relations Law (§166), the American Law Institute characterizes "Discrimination against Alien" in these terms:

(1) Conduct, attributable to a state and causing injury to an alien, that discriminates against aliens generally, against aliens of his nationality, or against him because he is an alien, departs from the international standard of justice specified in §165.

(2) Conduct discriminates against an alien within the meaning of Subsection (1) if it involves treating the alien differently from nationals or from aliens of a different nationality without a reasonable basis for the difference.

RESTATEMENT, *supra* note 8, at 507-08. <sup>51</sup> Borchard, *supra* note 47, at 55.

<sup>52</sup> F. DAWSON & I. HEAD, *supra* note 3, at 7.

<sup>53</sup> 3 G. HACKWORTH, *supra* note 7, at 658-60.

<sup>54</sup> The history of the standard of national treatment is well presented in *Garcia-Amador's First Report*, *supra* note 8, at 201-02; F. GARCIA-AMADOR, L. SOHN, & R. BAXTER, *supra* note 8, at 3-4.

<sup>55</sup> 6 C. CALVO, *LE DROIT INTERNATIONAL* 231 (5th ed. 1885), quoted in *Garcia-Amador's First Report*, *supra* note 8, at 201.

This formulation by Calvo was officially adopted by the First International Conference of American States held in Washington, 1889-1890:

1. Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be afforded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

2. A nation has not, nor recognizes in favor of foreigners, any other obligations or responsibilities than those which in favor of the natives are established, in like cases, by the constitution and the laws.<sup>56</sup>

Similarly, the Convention on Rights and Duties of States, adopted in 1933 at the Seventh International Conference of American States held in Montevideo, proclaimed in Article 9:

The jurisdiction of states within the limits of national territory applies to all the inhabitants.

Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.<sup>57</sup>

A comparable position has often been reiterated by Latin American statesmen and publicists.<sup>58</sup>

It scarcely requires argument that a principle of "national treatment" so specified, though it does not entirely repudiate international law, must leave aliens largely at the mercies of their host state. Such an interpretation of international law would, in Brierly's words, "make each state the judge of the standard required by international law and would virtually deprive aliens of the protection of their own state altogether."<sup>59</sup> In a world in which many states are tyrannical or totalitarian or otherwise oppressive such an outcome is not to be desired nor lightly accepted. The absurdity inherent in such an interpretation of international law was eloquently indicated by Secretary of State Hull: "It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape."<sup>60</sup> It is difficult not to accept the conclusion of Sohn and Baxter that

to a large extent the doctrine espousing the "national treatment" standard is merely a reflection of a fundamental hostility on the part of some nations to the idea of accountability of States for asserted violations of the rights of aliens.<sup>61</sup>

<sup>56</sup> THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, 1889 to 1928, at 45 (J. Scott ed. 1931).

<sup>57</sup> THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, FIRST SUPPLEMENT, 1933-1940, at 122 (Carnegie Endowment for International Peace ed. 1940).

<sup>58</sup> See *Garcia-Amador's First Report*, *supra* note 8, at 201-02; A. ROTH, *supra* note 31, at 62-80; I. BROWNLIE, *supra* note 7, at 509-10; W. GIBSON, *supra* note 14, at 19-44.

<sup>59</sup> J. BRIERLY, *supra* note 39, at 278-79.

<sup>60</sup> 3 G. HACKWORTH, *supra* note 7, at 659.

<sup>61</sup> F. GARCIA-AMADOR, L. SOHN, & R. BAXTER, *supra* note 8, at 158. Similarly, in the words of Goebel:

The Latin American states have shown considerable ingenuity in devising schemes to avoid liability for injuries to aliens. But to all appearances these have been

The doctrine of a "minimum international standard," in sharp contradiction to that of "national treatment," insists that a state cannot escape responsibility for the inhumane treatment of aliens by the allegation that it treats its own nationals likewise. This widely and long-accepted doctrine prescribes that there is a minimum common standard in relation to many important deprivations in social process which states must observe in the treatment of aliens irrespective of their treatment of their own nationals.<sup>62</sup> The classic statement of this standard, in elaboration of Vattel's thesis, is that of Elihu Root:

. . . Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that

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of no avail. They have repudiated the theory of responsibility not only in their diplomatic correspondence, but in their statutes, their treaties, and even in their constitutions. From a purely political point of view, the position of the Latin American states may be regarded as a protest against indiscriminate intervention by European states. It is an effort, moreover, to maintain the privileges of equality of states and the inviolability of territorial sovereignty. From the juridical standpoint, however, we see in this attempt at repudiation of the theory of responsibility, a final effort to regulate the liability of the state by municipal legislation. This in turn may be in some measure understood as a heritage of the mother country which, in the course of development, has taken a new direction.

Goebel, *supra* note 30, at 832.

<sup>62</sup> Borchard aptly summarized:

Thus, while equality is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality, the body of international law developed by diplomatic practice and arbitral decision, vague and indefinite as it may be, represents the minimum which each state must accord the alien whom it admits. Whether called the fundamental, natural, or inherent rights of humanity or of man or of the alien, this minimum has acquired a permanent place in the protective ambit of international forums.

Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 ASIL Procs. 51, 53 (1939).

On the international minimum standard, see C. AMERASINGHE, *supra* note 39 at 278-81; E. BORCHARD, *supra* note 4, at 39-43, 104-09; H. BRIGGS, *supra* note 39, at 562-67; I. BROWNLIE, *supra* note 7, at 510-14; F. DUNN, *supra* note 19, at 113-72; C. EAGLETON, *supra* note 39, at 82-87; A. FREEMAN, *supra* note 4, at 497-570; I L. OPPENHEIM, *supra* note 39, at 350-52; A. ROTH, *supra* note 31, at 81-123; RESTATEMENT, *supra* note 8, at 501-07; H. STEINER & D. VAGIS, *supra* note 13, at 360-530; 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, *supra* note 7, at 697-704; Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AJIL 121 (1946); Garcia-Amador, *supra* note 39, at 429-31; Garcia-Amador's *First Report*, *supra* note 8, at 199-201; Herz, *Expropriation of Foreign Property*, 35 AJIL 243, 260 (1941); Verdross, *Les Règles Internationales concernant le Traitement des Etrangers*, 37 HAGUE RECUEIL DES COURS 323, 348-88 (1931).

standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.<sup>63</sup>

The same formulation, echoed by many commentators, was supported by a majority of the state delegations represented at the Hague Codification Conference of 1930.<sup>64</sup> The Permanent Court of International Justice, in the *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, in outlining Poland's competence under a special agreement to derogate "from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights,"<sup>65</sup> referred both positively to "the limits set by the generally accepted principles of international law" and negatively to "generally accepted international law" as establishing "the only measures prohibited."<sup>66</sup>

The most important contribution toward the crystallization of this standard has come, however, in innumerable decisions rendered by international arbitral tribunals. The decisions of the United States-Mexican Claims Commission, established under the General Claims Convention of 1923,

<sup>63</sup> Root, *The Basis of Protection to Citizens Residing Abroad*, 4 ASIL Procs. 20-21 (1910).

More recently, Wilfred Jenks wrote:

The test is the "ordinary standards of civilisation"; the common denominator is the "practice of civilised nations"; the criterion is the judgment of a "reasonable and impartial man." These are all conceptions so general that their content will necessarily be determined by the policy of the times. The diplomatic protection of citizens abroad has often been associated in the past with the exercise of military, political or economic pressure by stronger against weaker States and it is therefore not a matter for surprise that a growing resistance to the concept of an international standard should have been an almost inevitable feature of a period of sharp criticism of neo-colonialism; but an international standard, fairly applied, is both so fundamental an element in the concept of internationally guaranteed basic human rights and so essential a prerequisite of any mutually beneficial international economic intercourse that the concept may be expected to reassert itself in deference to overriding considerations of international public policy which are entitled to claim, and may be expected to receive, general acceptance.

C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 514-15 (1964) (footnotes omitted).

<sup>64</sup> See Borchard, *Responsibility of States at the Hague Codification Conference*, 24 AJIL 517 (1930). See also H. BRIGGS, *supra* note 39, at 563-64; I. BROWNLIE, *supra* note 7, at 510; A. ROTH, *supra* note 31, at 104-11.

<sup>65</sup> *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, [1926] P.C.I.J., ser. A, No. 7, at 22.

<sup>66</sup> *Ibid.*

*Cf.* the summary of Freeman:

The contention that equality with nationals is the measure of a state's international obligations to aliens has been repeatedly rejected by international claims commissions as well as by the Permanent Court of International Justice itself. That court in the case concerning *Certain German Interests in Polish Upper Silesia* expressly recognized the existence of a common or generally accepted international law respecting the treatment of aliens and which is applicable to them despite municipal legislation.

Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AJIL 121, 126 (1946) (footnotes omitted).

<sup>67</sup> See A. FELLER, *THE MEXICAN CLAIMS COMMISSIONS, 1923-1934* (1935); A. ROTH, *supra* note 31, at 94-99; Borchard, *Decisions of the Claims Commissions, United States and Mexico*, 20 AJIL 536 (1926).

have been especially influential.<sup>67</sup> In one of its first decisions, the *Neer* case,<sup>68</sup> while disallowing U.S. claims that Mexican authorities did not exercise due diligence in apprehending armed murderers, this Commission affirmed that

the propriety of governmental acts should be put to the test of international standards, and . . . that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.<sup>69</sup>

Later in the *Roberts* case,<sup>70</sup> in holding that equality of treatment of nationals was no defense to the U.S. charge that Mexican authorities had arbitrarily and illegally arrested an American citizen and subjected him to cruel and inhumane treatment for a long period of time, the Commission reaffirmed:

Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.<sup>71</sup>

The Commission's "consistent" jurisprudence "along the lines of a well-founded and necessary postulate"<sup>72</sup> led Roth to observe:

The minimum standard has therewith become a reality which nobody may defy with impunity any more, and judging from its success, it certainly turned out that demand of long standing had been fulfilled with it.<sup>73</sup>

The doctrine of a minimum international standard found concrete expression, further, in numerous treaties, especially those of friendship, commerce, and navigation.<sup>74</sup> For example, the Convention respecting Conditions of Residence and Business and Jurisdiction between the British Empire, France, Italy, Japan, Greece, &c., and Turkey, signed at Lausanne

<sup>68</sup> *The United States of America on behalf of L.F.H. Neer and Pauline E. Neer, Claimants v. The United Mexican States* (October 15, 1926), in CLAIMS COMMISSION, UNITED STATES AND MEXICO, OPINIONS OF COMMISSIONERS UNDER THE CONVENTION CONCLUDED SEPTEMBER 8, 1923 BETWEEN THE UNITED STATES AND MEXICO, FEBRUARY 4, 1926, TO JULY 23, 1927, at 71 (1927) [hereinafter cited as OPINIONS OF COMMISSIONERS]; 4 U.N.R.I.A.A. 60; [1925-1926] ANN. DIG. Case No. 154, at 214.

<sup>69</sup> OPINIONS OF COMMISSIONERS, *supra* note 68, at 73.

<sup>70</sup> *The United States of America, on behalf of Harry Roberts, Claimant, v. The United Mexican States* (November 2, 1926), in OPINIONS OF COMMISSIONERS, *supra* note 68, at 100; 4 U.N.R.I.A.A. 77; 21 AJIL 357 (1927).

<sup>71</sup> OPINIONS OF COMMISSIONERS, *supra* note 68, at 105; 21 AJIL 357, 361 (1927).

<sup>72</sup> A. ROTH, *supra* note 31, at 97.

<sup>73</sup> *Ibid.*

<sup>74</sup> See R. WILSON, *supra* note 50.

on July 24, 1923, stipulated:

In Turkey the nationals of the other Contracting powers will be received and treated, both as regards their persons and property, in accordance with ordinary international law . . .<sup>75</sup>

The reference to "ordinary international law" has been well understood. In Roth's words:

Common international law provides for a special regime for the alien, largely consisting in a certain standard of treatment, which we have called the minimum standard. It is apparent therefore that any reference to the principles of common international law with regard to the treatment of the alien implies the recognition of the minimum standard.<sup>76</sup>

Though many of the agreements in the vast network of the treaties of friendship, commerce, and navigation that the United States has concluded with other countries provide for varying standards of treatment, including national treatment, with regard to different types of problems, they reflect an overall commitment to a minimum international standard.<sup>77</sup> Thus, the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany of 1954—the prototype of such treaties in the post World War II era—provides in Article 1:

1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

2. Between the territories of the two Parties there shall be, in accordance with the provisions of the present Treaty, freedom of commerce and navigation.<sup>78</sup>

The standards established in many of these treaties often go beyond na-

<sup>75</sup> 28 LNTS 151, 157.

Another example is the Treaty of Friendship and Establishment between Egypt and Persia of 1928 which provided, in Article 4, that

The nationals of each of the High Contracting parties . . . shall enjoy, on the same footing as nationals, the most constant protection and security for their persons, property, rights and interests, in conformity with ordinary international law.

93 LNTS 381, 397.

<sup>76</sup> A. ROTH, *supra* note 31, at 99.

<sup>77</sup> R. WILSON, *supra* note 50, at 6-9. Cf. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1974 (Dep't of State Pub. 8755, 1974); R. WILSON, THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES 87-134 (1953). For a latest example see Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania; TRADE AGREEMENT BETWEEN THE UNITED STATES AND ROMANIA, H.R. Doc. No. 94-114, 94th Cong., 1st Sess. (1975); 14 ILM 671 (1975).

Treaties of friendship, commerce, and navigation between countries other than the United States are similar in terms. See, e.g., Treaty of Friendship, Commerce and Navigation between Japan and the Argentine Republic, signed on 20 December 1961; 613 UNTS 323.

<sup>78</sup> [1954] 7 UST 1839, 1841; 273 UNTS 3,4; TIAS No. 3593.

tional treatment in relation to particular problems, most notably in the form of "most-favored-nation-treatment."<sup>79</sup>

The minimum international standard for treatment of aliens, like all prescriptions which require delicate relation to the many varying features of differing contexts, has of necessity been left highly general in its empirical reference. The distinction between the lawful differentiation of the status within a country of nationals and aliens upon a reasonable basis and the discrimination against the alien which is arbitrary and unlawful must depend not only upon the values which are primarily at stake but also upon many varying features of the institutional practices by which such values are sought and shaped. The minimum international standard has, however, despite this fundamental difficulty shared by most other important prescriptions, been frequently and widely applied for the protection of aliens in many different value and institutional contexts.<sup>80</sup>

A most comprehensive summary is offered by Roth, though some commentators may not agree with all his characterizations:

(1) An alien, whether natural person or corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving State.

(2) The alien can lawfully demand respect for his life and protection for his body.

(3) International law protects the alien's personal and spiritual liberty within socially bearable limits.

(4) According to general international law, aliens enjoy no political rights in their State of residence, but have to fulfil such public duties as are not incompatible with allegiance to their home State.

(5) General international law gives aliens no right to be economically active in foreign States. In cases where the national policies of foreign States allow aliens to undertake economic activities, however, general international law assures aliens of equality of commercial treatment among themselves.

(6) According to general international law, the alien's privilege of participation in the economic life of his State of residence does not go

<sup>79</sup> On most-favored-nation treatment, see generally L. CHEN, *STATE SUCCESSION RELATING TO UNEQUAL TREATIES* 96-103 (1974); Schwarzenberger, *The Most-Favoured Nation Standard in British State Practice*, 22 *BRIT. Y.B. INT'L L.* 99 (1945); *The Most-Favored-Nation Clause in the Law of Treaties*, working paper submitted by Mr. Endre Ustor, UN Doc. A/CN.4/L.127 (1968), [1968] 2 *Y.B. INT'L L. COMM'N* 165; Ustor, [First] *Report on the Most-Favored Nation Clause*, UN Doc. A/CN.4/213 (1969); *Second Report*, UN Doc. A/CN.4/228 & Add. 1 (1970); *Third Report*, UN Doc. A/CN.4/257 & Add. 1 (1972); *Fourth Report*, UN Doc. A/CN.4/266 (1973).

<sup>80</sup> See A. ROTH, *supra* note 31, at 127-91; H. STEINER & D. VAGTS, *supra* note 13, at 357-530. See also note 62 *supra*. One important contemporary mode of settling disputes about the treatment of aliens is that of lump sum settlement between states. The inherited doctrines about aliens appear to achieve a continuing viability both in the terms of settlement and in the internal decisions by which the agreed sums are apportioned. Note the wide range in types of controversies indicated in the comprehensive and insightful study, R. LILICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975).

so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all certain property, whether movables or realty.

(7) Wherever the alien enjoys the privilege of ownership of property, international law protects his rights in so far as his property may not be expropriated under any pretext, except for moral or penal reasons, without adequate compensation. Property rights are to be understood as rights to tangible property which have come into concrete existence according to the municipal law of the alien's State of residence.

(8) International law grants the alien procedural rights in his State of residence as primary protection against the violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time.<sup>81</sup>

Long before it sought generally to protect the fundamental rights of the individual against his own state, international law created, thus, an extensive and important protection for aliens in many different value processes.<sup>82</sup>

<sup>81</sup> A. ROSE, *supra* note 31, at 185-86. For a more detailed analysis of this recapitulation, see *id.* at 127-85.

<sup>82</sup> The special protection accorded aliens under customary international law was such that Lauterpacht offered this observation:

Although international law does not at present recognise, apart from treaty, any fundamental rights of the individual protected by international society as against the State of which he is a national, it does acknowledge some of the principal fundamental rights of the individual in one particular sphere, namely, in respect of aliens. These are entitled to treatment conforming to a minimum standard of civilisation regardless of how the State where they reside treats its own nationals. That minimum standard of civilisation comprises, in particular, the right of personal liberty and, generally, the right to equality before the law. International tribunals have repeatedly declared it to be a rule of international law. The result, which is somewhat paradoxical, is that the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State.

#### H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 121 (1950; 1968).

A specification of the exact scope of the protection thus accorded to aliens by customary international law would require a comprehensive study of past decisions, value by value. Whether a particular differentiation of aliens and nationals has a reasonable basis in the common interest of the larger community must of course depend not only upon the value primarily at stake in the differentiation but also upon many particular, and varying, features of the context in which the differentiation is made. It is this infinite complexity in the patterning of fact, as well as the failure to clarify common interest, which accounts for some of the continuing controversy over particular kinds of deprivations of aliens, such as in the nationalization or expropriation of property and the unilateral termination of agreements. See note 13 *supra*. This controversy has recently been dramatized in the adoption by the UN General Assembly of "Declaration on the Establishment of a New International Economic Order" and its accompanying "Programme of Action" in May 1974 and of "The Charter of Economic Rights and Duties of States" in December 1974. See G.A. Res. 3201 (S-VI), May 1, 1974, UN GAOR, 6 SPEC. SESS., SUPP.1, at 3, UN Doc. A/9559 (1974); G.A. Res. 3202 (S-VI), May 1, 1974, *id.* at 6; G.A. Res. 3281 (XXIX), Dec. 12, 1974, UN Doc. A/Res/3281 (XXIX) (1975). See also 13 ILM 715 (1974); *id.*, 720; 14 *id.* 251 (1975); 68 AJIL 798 (1974); 69 *id.* 484 (1975). For further pertinent references

The new epoch in the international protection of human rights ushered in by the United Nations has, paradoxically, been attended by some unnecessary confusion about the continued protection of aliens. The rapid multiplication of newly independent states, arising from the emancipation of ex-colonial peoples, and the deepening of ideological rifts about the world have brought intense challenges to many customary prescriptions, including those about the responsibility of states.<sup>83</sup> The principle of the minimum international standard for the protection of aliens has been subjected to especially severe attack. Thus, Mr. Padilla Nervo (Mexico) (later Judge of the International Court of Justice), in reinforcement of traditional Latin American attitudes, spoke sharply before the International Law Commission:

The vast majority of new States had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century. In the case of the law of the sea, for instance, though the future needs and interests of newly-established small countries were not taken into account, at least the body of principles thus created was not directly inimical to them. With State responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States. Probably ninety-five per cent of the international disputes involving State responsibility over the last century had been between a great industrial Power and a small, newly-established State. Such inequality of strength was reflected in an inequality of rights, the vital principle of international law, *par in parem non habet imperium* being completely disregarded. . . .<sup>84</sup>

to this development, see *Recent Developments, The General Assembly's International Economics*, 16 HARV. INT'L L. J. 670 (1975). A panorama of conflicting views is offered in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed. 1975).

<sup>83</sup> Cf. generally ASIAN STATES AND THE DEVELOPMENT OF UNIVERSAL INTERNATIONAL LAW (R. Anand ed. 1972); A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971); L. CHEN, *supra* note 79; J. COHEN & H. CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY (1974); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964); R. HIGGINS, CONFLICT OF INTEREST (1964); F. OKOYE, INTERNATIONAL LAW AND THE NEW AFRICAN STATES (1972); B. ROLING, INTERNATIONAL LAW IN AN EXPANDED WORLD (1960); S. SINHA, NEW NATIONS AND THE LAW OF NATIONS (1967); J. SYATAUW, SOME NEWLY ESTABLISHED STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW (1961); G. TUNKIN, *supra* note 39; Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38 (1961); Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L. J. 969 (1975); Falk, *The New States and International Legal Order*, 118 HAGUE RECUEIL DES COURS 1 (1966); Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783 (1964); Fatouros, *The Participation of the "New" States in the International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 317-71 (R. Falk & C. Black eds. 1969); Guha-Roy, *Is the Law of Responsibility of States for Injuries to Aliens A Part of Universal International Law?*, 55 AJIL 863 (1961), reprinted in L. GROSS, *supra* note 39, at 537-85; Lissitzyn, *International Law in a Divided World*, 542 INT'L CONCILIATION (1963); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AJIL 1 (1959), reprinted in L. GROSS, *supra* note 39, at 169-97.

<sup>84</sup> [1957] 1 Y.B. INT'L L. COMM'N 155 (Remarks at the 413th meeting).

A more detailed attack was made by S. N. Guha-Roy, who proposed a "thorough reexamination" of the customary law about the responsibility of states for injuries to aliens, "from the standpoint of the new states" and in the interest of an "absolute justice."<sup>85</sup> Building upon the assumption that "a custom [is] in no way binding on other states, unless it can be shown to have had its roots in some general principles of law of a more or less universal character,"<sup>86</sup> Guha-Roy has no difficulty in concluding that "the law of responsibility of states for aliens" is not a "part of universal international law."<sup>87</sup>

The law of responsibility then, is not founded on any universal principles of law or morality. Its sole foundation is custom, which is binding only among states where it either grew up or came to be adopted. It is thus hardly possible to maintain that it is still part of universal international law. Whatever the basis of obligation in international law in the past, when the international community was restricted to only a few states, including those, fewer still, admitted into it from time to time, the birth of a new world community has brought about a radical change which makes the traditional basis of obligation outmoded.<sup>88</sup>

It should be obvious that from Guha-Roy's mystical assumption about how transnational expectations of authority are created the same, or the opposite, conclusion could be made about any asserted prescription.<sup>89</sup>

The more substantive arguments Guha-Roy makes for dismissing "what is ordinarily presented as the international standard of justice" are stated in the form of "five objections:"

First, a national of one state, going out to another in search of wealth or for any other purpose entirely at his own risk, may well be left to the consequences of his own ventures, even in countries known to be dangerous. For international law to concern itself with his protection in a state without that state's consent amounts to an infringement of that state's sovereignty. Secondly, a standard open only to aliens but denied to a state's own citizens inevitably widens the gulf between citizens and aliens and thus hampers, rather than helps, free intercourse among peoples of different states. Thirdly, the standard is rather vague and indefinite. Fourthly, the very introduction of an external yardstick for the internal machinery of justice is apt to be looked upon as an affront to the national system, whether or not it is below the international standard. Fifthly, a different standard of justice for aliens results in a twofold differentiation in a state where the internal standard is below the international standard. Its citizens as aliens in other states are entitled to a higher standard than their fellow citizens at home. Again, the citizens of other states as aliens in it are also entitled to a better standard than its own citizens.<sup>90</sup>

These "objections" may be observed to ignore the role of the international

<sup>85</sup> Guha-Roy, *supra* note 83, at 537-65.      <sup>86</sup> *Id.* at 546.

<sup>87</sup> *Id.* at 562.

<sup>88</sup> *Ibid.*

<sup>89</sup> Guha-Roy repeatedly makes clear that he regards "custom" and "general principles" as distinct and that his "general principles" are to be found only in some brooding metaphysical or "natural law" omnipresence. *See id.* at 539, 546, 550, 555.

<sup>90</sup> *Id.* at 563.

standard in the maintenance of a world economy and society, to underestimate the interests of any particular territorial community in the maintenance of such larger economy and society, to minimize the importance of the international protection of the human rights of even citizens or nationals,<sup>91</sup> to undercut the vast flow across state lines today of prescriptive communication about the protection of both nationals and aliens, and to aggrandize the technical concepts of sovereignty and of territorial jurisdiction.

In the context of such confusion it is understandable that the International Law Commission has made little headway in its protracted effort to clarify and codify the law of state responsibility.<sup>92</sup> The first Special Rapporteur of the Commission, Dr. Garcia-Amador, essayed a noble "synthesis" of the newer emerging law of human rights and the older law designed for the protection of aliens in proposing both that the newer human rights prescriptions be employed to give more precise content to the inherited minimum international standard for aliens and that the newer remedies being established for the protection of human rights generally be made to supersede certain aspects of the hallowed state interposition on behalf of its injured nationals.<sup>93</sup> In eloquent diagnosis of the problem he stated:

In traditional international law the "responsibility of States for damage done in their territory to the person or property of foreigners" frequently appears closely bound up with two great doctrines or principles: the so-called "international standards of justice," and the prin-

<sup>91</sup> Even in this day of the human rights movement, Guha-Roy writes: "It is, however, no concern of international law how a state discharges its responsibility to its own nationals or if it discharges that responsibility at all." *Id.* at 538.

<sup>92</sup> See Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens*, 16 SYRACUSE L. REV. 745 (1965); LILICH, *Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility id.*, 721.

For an overall review, see *Garcia-Amador's Six Reports*, *supra* note 8. For more recent developments, see *First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur*, [1969] 2 Y.B. INT'L L. COMM'N 125-56, UN Doc. A/CN.4/217 and Add.1 (1969) (it deals with "Review of previous work on codification of the topic of the international responsibility of States"); *Supplement, prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to state responsibility,"* [1969] 2 Y.B. INT'L L. COMM'N 101-13, UN Doc. A/CN.4/208 (1969); *Proposals submitted to, and decisions of, various United Nations organs relating to the question of State responsibility: supplement prepared by the Secretariat to document A/CN.4/165*, [1969] 2 Y.B. INT'L L. COMM'N 114-24, UN Doc. A/CN.4/209 (1969); *Second report on State responsibility, by Mr. Roberto Ago, Special Rapporteur*, [1970] 2 Y.B. INT'L L. COMM'N 177-97, UN Doc. A/CN.4/233 (1970) ("The origin of international responsibility"). For a recent discussion on the question of state responsibility before the International Law Commission, see [1973] 1 Y.B. INT'L L. COMM'N 5-66 (1202nd meeting to 1215th meeting). See also Kearney, *The Twenty-Six Session of the International Law Commission*, 69 AJIL 591, 602-07 (1975).

The more recent work of the Commission has been at such a high level of abstraction as to shed but a dim light upon specific controversies. The underlying assumption seems to be that state responsibility is best studied apart from particular context.

<sup>93</sup> See *Garcia-Amador's First Report*, *supra* note 8, at 199-203; Garcia-Amador, *supra* note 39, at 467.

ciple of the equality of nationals and aliens. The first of these principles has been invoked in the past as the basis for the exercise of the right of States to protect their nationals abroad, while the second has been relied on for the purpose of rebutting responsibility on the part of the State of residence when the aliens concerned received the same treatment and were granted the same legal or judicial protection as its own nationals.

Although, therefore, both principles had the same basic purpose, namely, the protection of the person and of his property, they appeared both in traditional theory and in past practice as mutually conflicting and irreconcilable.

Yet, if the question is examined in the light of international law in its present stage of development, one obtains a very different impression. What was formerly the object of these two principles—the protection of the person and of his property—is now intended to be accomplished by the international recognition of the essential rights of man. Under this new legal doctrine, the distinction between nationals and aliens no longer has any *raison d'être*, so that both in theory and in practice these two traditional principles are henceforth inapplicable. In effect, both of these principles appear to have been outgrown by contemporary international law.<sup>94</sup>

His basic proposal was for equality of nationals and aliens, with both a minimum and a maximum in internationally recognized “fundamental human rights:”

1. The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the “fundamental human rights” recognized and defined in contemporary international instruments.

2. In consequence, in case of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized “fundamental human rights” are affected.<sup>95</sup>

The “fundamental human rights” he specified for framing the combined contours of state responsibility were extensive:

- (a) The right to life, liberty and security of person;
- (b) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;
- (c) The right to freedom of thought, conscience and religion;
- (d) The right to own property;
- (e) The right of the person to recognition everywhere as a person before the law;
- (f) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

<sup>94</sup> *Id.* at 199.

<sup>95</sup> *Garcia-Amador's Second Report, supra* note 8, at 112–13.

(g) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of rights and obligations under civil law;

(h) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defense or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.<sup>96</sup>

This imaginative proposal by Dr. Garcia-Amador has not, unhappily, enjoyed wide approval from either state spokesmen or private commentators. By some his proposal is thought to extend the substantive protection of aliens much beyond what states can reasonably be expected to accept and to exacerbate the problems of cooperation between states of differing degrees of socialization.<sup>97</sup> By others he might be thought, perhaps justifiably, to weaken an important traditional remedy for the protection of aliens before any effective new remedy is established in replacement.<sup>98</sup>

The newly emerged contemporary human rights prescriptions, including both the United Nations Charter and ancillary expressions, would indeed appear, however these prescriptions may ultimately be synthesized with the older doctrines of state responsibility, to have importantly increased the transnational protection that world constitutive process affords aliens.<sup>99</sup>

<sup>96</sup> *Id.* at 113.

<sup>97</sup> C. AMERASINGHE, *supra* note 39, at 278-81, I. BROWNLIE, *supra* note 7, at 513-14.

<sup>98</sup> In the words of Amerasinghe:

There is scope, then, for the application in practice of the general non-conventional law of alien treatment, in view of the absence of any universal conventional law to replace it, whether in regard to economic interests alone or in regard to personal and social interests as well. What is more, any general convention governing the responsibility of States for injuries to aliens must take into account the existing general non-conventional law.

C. AMERASINGHE, *supra* note 39, at 7.

See Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack*, 69 AJIL 359 (1975).

<sup>99</sup> In the words of Sir Humphrey Waldock:

International lawyers have already begun to speak of the assimilation of the customary law regarding the treatment of aliens with the new law of the Charter regarding "universal respect for, and observance of, human rights." The assimilation is logical enough so far as concerns the "minimum standards" of treatment, that is, the scope of the fundamental rights and freedoms protected by international law. Human Rights, *ex hypothesi*, are rights which attach to all human beings equally, whatever their nationality. And in general, as I have said, the Universal Declaration offers aliens at least as much as the minimum standards of treatment guaranteed under customary law. To assimilate the position of aliens to that of nationals in regard to remedies would, however, be wholly unacceptable in the present state of international remedies for violations of human rights.

Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1, 3 (1965) (The British Institute of International and Comparative Law, International Law Series No. 5) (footnote omitted).

Although nowhere in the Charter or other nondiscrimination prescriptions is alienage specifically included among the impermissible grounds of differentiation,<sup>100</sup> it is unmistakably clear that in the future differentiation of

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The protection of the rights of aliens is a matter of current concern within the United Nations. Pursuant to Resolution 1790 (LIV) of May 18, 1973 of the Economic and Social Council, as originated from a resolution of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in August 1972 that was endorsed by the Commission on Human Rights, the UN Secretary-General conducted in 1973 a "survey of international instruments in the field of human rights concerning distinctions in the enjoyment of certain rights as between nationals and individuals who are not citizens of the States in which they live." See *The Problem of the Applicability of Existing International Provisions for the Protection of the Human Rights of Individuals Who Are Not Citizens of the Country in which They Live*, UN Doc. E/CN.4/Sub.2/335 (1973) [hereinafter cited as *Note on Aliens by the Secretary-General*]. Cf. also Briggs, *The "Rights of Aliens" and International Protection of Human Rights*, in ASPECTS OF LIBERTY 213-31 (M. Konvitz & C. Rossiter eds. 1958); Freeman, *Human Rights and the Rights of Aliens*, 45 ASIL PROCS. 120 (1951).

The distinction made by Weis between protection of the interests of states under the customary international law of state responsibility and the interests of the larger international community under the human rights prescriptions is an utterly artificial one, which should be made to disappear. See Weis, *Diplomatic Protection of Nationals and International Protection of Human Rights*, 4 HUMAN RIGHTS J. 643, 675 (1971).

<sup>100</sup> See UN Charter, Arts. 1(3), 13(1)(b), 55(c), 56, 62(2), and 76(c); *The Protection of Respect and Human Rights*, *supra* note 2, at 1034-41.

It has been suggested by a reader that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights do not protect aliens because "nationality" is not listed as a prohibited ground of differentiation. This astonishing interpretation of these various prescriptions finds no basis even in the literal words of these prescriptions.

The Universal Declaration, in the first paragraph of Article 2, provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS I, UN Doc. ST/HR/1 (1973) [hereinafter cited as UN HUMAN RIGHTS INSTRUMENTS]. It will be noted that these words stipulate that "all the rights and freedoms" are conferred upon "everyone," and begin the list of prohibited grounds with "such as," clearly indicating that the list is not intended to be exhaustive. A similar formulation appears in Article 2(1) of the International Covenant on Civil and Political Rights:

Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals* within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without *distinction* of any kind, *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UN HUMAN RIGHTS INSTRUMENTS, *supra*, at 8 (emphasis added). It has been generally recognized that one of the major purposes of the whole panoply of human rights prescriptions has been to accord the nationals of a state the same protection previously accorded aliens and to make unnecessary, in general, any differentiation between aliens and nationals. There is nothing in the legislative history (*travaux préparatoires*) of these prescriptions to suggest any intent to exclude aliens from protection.

The one possible exception to this conclusion is in the International Covenant on Economic, Social, and Cultural Rights, which is worded somewhat differently from the

treatment because of alienage will be much more strictly confined and that unlawful discrimination, with respect to many values, may be much more readily found.

It may be recalled that though the United Nations Charter enumerates only four specific grounds of impermissible differentiation—race, sex, language, and religion—these are intended to be illustrative and not exhaustive. The more detailed formulation in the Universal Declaration of Human Rights makes this abundantly clear.<sup>101</sup> The standard formula employed by the Universal Declaration is: "Everyone has the right to . . ." <sup>102</sup> Negatively, the formula is: "No one shall be. . ." <sup>103</sup> "Everyone" would appear to refer to all human beings, national and alien alike. When "everyone" is given a restrictive reference to a national only, the Universal Declaration makes this explicitly clear. Thus, Article 21 provides in part:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

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Covenant on Civil and Political Rights. Article 2(2) reads:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without *discrimination* of any kind *as to* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

UN HUMAN RIGHTS INSTRUMENTS, *supra*, at 4 (emphasis added). Note the substitution of "discrimination" for "distinction" and the substitution of "as to" for "such as." Article 2(3) adds:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

UN HUMAN RIGHTS INSTRUMENTS, *supra*, at 4. These provisions could, unfortunately for common interest, be construed to permit some states to discriminate against aliens with respect to some economic rights. It has been recorded that Article 2(3) was adopted by the Third Committee of the General Assembly by "41 votes to 38, with 12 abstentions," and that it was characterized by many delegates as "contrary to the spirit of universality and equality underlying the draft Covenant and likely to give rise to all kinds of discrimination alien to the intentions of the sponsors." Sohn, *Supplementary Paper: A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 38, 116 (1968). The ambiguities in the language of Article 2(2)(3) are spelled out in *Note on Aliens by the Secretary-General*, *supra* note 99, at 8-11.

It may be noted, incidentally, that the International Covenant on Economic, Social, and Cultural Rights has been operative since January 3, 1976. 12 UN MONTHLY CHRONICLE 28 (Nov. 1975). Similarly, the International Covenant on Civil and Political Rights has been operative since March 23, 1976. 13 *id.* 73 (Jan. 1976).

<sup>101</sup> See *Note on Aliens by the Secretary-General*, *supra* note 99, at 7.

<sup>102</sup> E.g., Article 3: "Everyone has the right to life, liberty and the security of person." Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." UN HUMAN RIGHTS INSTRUMENTS, *supra* note 100, at 1. See also Arts. 2, 6, 8, 11(1), 13, 14, 15(1), 17(1), 18, 19, 20(1), 21, 22, 23, 24, 26(1), 27, 28, 29(1), in *id.* at 1-3.

<sup>103</sup> E.g., Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 17(2): "No one shall be arbitrarily deprived of his property." *Id.* at 1-2. See also Articles 4, 9, 11(2), 12, 15(2), 20(2), *ibid.*

2. Everyone has the right of equal access to public service in his country.<sup>104</sup>

This is the only place in the Universal Declaration that a specified right is reserved for nationals only.<sup>105</sup> This provision reflects only the long shared community expectation that differentiation on the basis of alienage is permissible in regard to participation in the making of community decisions, *i.e.*, voting and office-holding.<sup>106</sup> The concern in the Universal Declaration that human rights be protected for every human being, regardless of nationality, is further manifested in the latter half of Article 2:

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.<sup>107</sup>

This same concern for all human beings is even more pronounced in the International Covenant on Civil and Political Rights. This Covenant again employs, in general, the formulae that "Everyone shall have the right to . . ." <sup>108</sup> and that "No one shall be . . ." <sup>109</sup> Reference is clearly to every person, national or alien. Where distinction is intended between nationals and aliens, the Covenant is explicit. Thus, Article 25 provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.<sup>110</sup>

The wording "every citizen" instead of "everyone" is significant. Again,

<sup>104</sup> *Ibid.*

<sup>105</sup> Articles 13(2) of the Universal Declaration provides that "Everyone has the right to leave any country, including his own, and to return to *his* country." The right to return, thus, purports to extend only to nationals. Conversely, the asylum provision, Article 14(1) of the Universal Declaration, that "Everyone has the right to seek and to enjoy in other countries asylum from persecution" is obviously intended for non-nationals.

<sup>106</sup> See H. SANTA CRUZ, *STUDY OF DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS* 26-27, UN Doc. E/CN.4/Sub.2/213/Rev.1 (1962).

<sup>107</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 100, at 1.

<sup>108</sup> *E.g.*, Article 19(1): "Everyone shall have the right to hold opinions without interference." *Id.* at 11. See also Articles 9(1), 14(2)(3)(5), 16, 17(2), 18(1), 19(2), 22(1), *id.* at 9-11. In addition, the Covenant on Civil and Political Rights employs such subjects as "Every human being" (Art. 6(1)), "Anyone" (Arts. 9(2-5)), and "All persons" (Arts. 10(1), 14(1), and 26). *Id.* at 9-11.

<sup>109</sup> *E.g.*, Article 11: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." *Id.* at 9. See also Arts. 7, 8, 14(7), 15(1), 17(1), 18(2). *Id.* at 9-11.

<sup>110</sup> *Id.* at 11.

this prescription is in deference to and expressive of the customary law that permits exclusion of aliens from participation in voting and office-holding. Similarly, Article 12(4) provides: "No one shall be arbitrarily deprived of the right to enter his own country."<sup>111</sup> When a prescription concerns aliens only, it is thus made clear. Article 13 reads:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>112</sup>

In the International Covenant on Economic, Social, and Cultural Rights the rights protected are again designed for all human beings, irrespective of nationality.<sup>113</sup> Thus, the Covenant stipulates that the states parties "recognize the right of everyone to" "work,"<sup>114</sup> "the enjoyment of just and favourable conditions of work,"<sup>115</sup> "form trade unions and join the trade union of his choice,"<sup>116</sup> "social security,"<sup>117</sup> "an adequate standard of living,"<sup>118</sup> "be free from hunger,"<sup>119</sup> "the enjoyment of the highest attainable standard of physical and mental health,"<sup>120</sup> "education,"<sup>121</sup> "take part in cultural life"<sup>122</sup> and so on.

Even human rights conventions with a more restrictive focus are, again, formulated generally in terms of every individual human being. When

<sup>111</sup> *Id.* at 10.

<sup>112</sup> *Id.* The overriding goal for the protection of every human being, as enunciated in the International Covenant on Civil and Political Rights, is unequivocally reiterated in the Optional Protocol to this Covenant. Thus, Article 1 of the Optional Protocol reads:

A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

*Id.* at 16. The protection and remedies are clearly extended to all "individuals subject to jurisdiction" of a contracting state, and not only those who possess its nationality.

<sup>113</sup> It is clear that in this particular Covenant a state may differentiate treatment of aliens from nationals upon a reasonable basis. This is very far from providing that a state may discriminate against aliens. The reference, in Article 2(3), that "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals" would be totally unnecessary if states may generally discriminate against aliens. For expressions of more tentative conclusions, see *Note on Aliens by the Secretary-General*, *supra* note 99, at 8-11; *Elles*, *supra* note 1, at 308-09.

<sup>114</sup> Art. 6(1), UN HUMAN RIGHTS INSTRUMENTS, *supra* note 100, at 4.

<sup>115</sup> Art. 7. *Ibid.*

<sup>116</sup> Art. 8(1)(a). *Ibid.*

<sup>117</sup> Art. 9. *Ibid.*

<sup>118</sup> Art. 11(1). *Id.* at 5.

<sup>119</sup> Art. 11(2). *Ibid.*

<sup>120</sup> Art. 12. *Ibid.*

<sup>121</sup> Art. 13(1). *Ibid.*

<sup>122</sup> Art. 15(1). *Id.* at 6.

alienage becomes relevant, it appears clear from each particular context.<sup>123</sup> Special attention may be called to Article 1(2) of the International Convention on the Elimination of Racial Discrimination, which reads:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.<sup>124</sup>

In the light of the major purposes of the Convention and the relevant context, it would appear clear that this provision was intended only to reserve to states a competence to continue to make the historic differentiations between aliens and nationals established as reasonable under customary international law. It was not intended as an oblique, new prescription that alienage is in general a permissible ground of discrimination.<sup>125</sup> Differentiation on the basis of alienage in regard to such matters as voting and office-holding, as customarily accepted, continues to be permissible, but the standard of treatment accorded to aliens, as established under customary international law and the contemporary human rights law with respect to other values, is not to be diluted.<sup>126</sup>

The two regional human rights conventions—European and American—are both cast in broad language designed to protect aliens as well as nationals. The European Convention, in Article 1, provides:

The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention.<sup>127</sup>

<sup>123</sup> See, e.g., Article 3(e) of the Convention against Discrimination in Education: "In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake: . . . (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals." *Id.* at 31–32. Cf. also Art. 3(c) of the same Convention, *id.* at 31; Declaration on the Elimination of Discrimination against Women, Art. 5, *id.* at 39; Convention relating to the Status of Stateless Persons, Art. 3, *id.* at 61; Convention relating to the Status of Refugees, Art. 3, *id.* at 68.

<sup>124</sup> *Id.* at 24. The appropriate interpretation of this language in the light of the major purposes of the Convention and the absence of *travaux* to the contrary is that states may continue to differentiate between aliens and nationals on the bases that historically have been regarded as having a reasonable relation to their differences. This means, as was the principal thrust of the Convention for all individuals, that states may not discriminate against aliens on racial grounds.

It may further be noted that Article 1(3) of this Convention provides:

Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

<sup>125</sup> Cf. Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L. Q. 996, 1006–09 (1966); *Note on Aliens by the Secretary-General*, *supra* note 99, at 16–17.

<sup>126</sup> See Schwelb, *supra* note 125, at 1007–08. Cf. also *Note on Aliens by the Secretary-General*, *supra* note 99, at 16.

For an exposition of other prescriptions relevant to aliens, see *Note on Aliens by the Secretary-General*, *supra* at 18–35. See also Elles, *supra* note 1; Weis, *supra* note 99.

<sup>127</sup> COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 2 (9th ed. 1974). Its text can also be conveniently found in BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 125 (L. Sohn & T. Buergenthal eds.

Thus, the European Commission on Human Rights has over the years received innumerable individual petitions ("applications") brought by non-nationals resident in the member states of the Council of Europe.<sup>128</sup> The significance of this jurisprudence and practice has been underlined by Fawcett:

This marks the great departure taken by the Convention from traditional forms of the international protection of individuals, for it dispenses with nationality as a condition of protection. Each contracting State undertakes to secure the rights and freedoms of Section I to everyone within its jurisdiction, whether he or she is an alien, a national of the State, or a stateless person, and regardless of civil status.<sup>129</sup>

In keeping with the human rights conventions on the global scale, the European Convention, in referring to a specified right, employs the general formulae that "Everyone has the right to . . ." <sup>130</sup> and that "No one shall be . . ." <sup>131</sup>

The same interpretation would appear equally applicable to the American Convention on Human Rights. Significantly, the American Conven-

1973) [hereinafter cited as BASIC DOCUMENTS]; and in BASIC DOCUMENTS ON HUMAN RIGHTS 338, 340 (I. Brownlie ed. 1971).

<sup>128</sup> For recent statistical data, see McNulty, *Stock-Taking on the European Convention on Human Rights* 59-61, Doc. DH(73)8 (1973); McNulty, *Stock-Taking on the European Convention on Human Rights* 66-69, Doc. DH(74) 6 (Oct. 1, 1974) [hereinafter cited as *McNulty's Stock-Taking 1974*].

<sup>129</sup> J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 18 (1969).

<sup>130</sup> See, e.g., Arts. 5, 6, 8, 9, 10, 11, 13; BASIC DOCUMENTS, *supra* note 127, at 126-30.

<sup>131</sup> See, e.g., Arts. 3, 4, 7; *id.* at 126, 128.

Article 14 of the European Convention on Human Rights reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

*Id.* at 130. It will be noted, again, that the list of prohibited grounds begins with "such as," which clearly indicates that the list is merely illustrative. Cf. note 100 *supra*.

When the Convention intends to permit restrictions upon aliens, it explicitly says so. Thus, Article 16 stipulates:

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

*Id.* at 130. Similarly, Protocol No. 4 to the Convention, in Articles 3 and 4, makes explicit the distinction between nationals and aliens. Article 3 reads:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

*Id.* at 146. Article 4 states: "Collective expulsion of aliens is prohibited." *Ibid.*

The fact that an individual is an alien may of course be a relevant variable in contexts in which states engage in permissible accommodations and derogations, as provided in Articles 8-11 and 15 of the European Convention. *Id.* at 128-30. This does not mean that alienage per se is a permissible ground for discrimination; it means only that alienage continues to be in some contexts a fact that may rationally be taken into account in determining the necessity and proportionality of a differentiation.

tion contains, in the Preamble, the unique proclamation that

the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality.<sup>132</sup>

The Convention thus specifies in Article 1:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.<sup>133</sup>

In regard to each of the specific rights to be protected, the Convention has employed the standard formulae that "Every person (or "everyone") has the right to . . ." <sup>134</sup> and that "No one shall be . . ." <sup>135</sup> When reference is confined to aliens, it is explicitly stated. Thus, Article 22(6) reads: "An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law." <sup>136</sup> Article 22(8) stipulates:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.<sup>137</sup>

Article 22(9) also reads: "The collective expulsion of aliens is prohibited." <sup>138</sup> In contrast, when reference is restricted to nationals, it is also clearly stated. Thus, Article 22(5) reads: "No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it." <sup>139</sup> Similarly, Article 23 provides:

1. Every citizen shall enjoy the following rights and opportunities:
  - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
  - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
  - c. to have access, under general conditions of equality, to the public service of his country.

<sup>132</sup> *Id.* at 209.

<sup>133</sup> *Id.* at 210.

The Charter of the Organization of American States, as amended, states in Article 3(j) that the "American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex." A. PEASLEE, INTERNATIONAL GOVERNMENTAL ORGANIZATIONS 1182, 1183 (rev. 3d ed. 1974).

<sup>134</sup> See, e.g., Arts. 3, 4(1), 5(1), 7(1), 8, 10, 11, 12(1), 13(1), 16(1), 18, 20, 21(1), 22(1)(2), 25(1); BASIC DOCUMENTS, *supra* note 127, at 210-18.

<sup>135</sup> See, e.g., Arts. 5(2), 6, 7(2)(3), 9, 11(2), 12(2), 21(2); *id.* at 211-17.

<sup>136</sup> *Id.* at 217.

<sup>137</sup> *Id.* at 217-18.

<sup>138</sup> *Id.* at 218.

<sup>139</sup> *Id.* at 217.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.<sup>140</sup>

In sum, the principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard developed under the earlier customary law.<sup>141</sup> When the new human rights prescriptions are considered in mass, they extend to all the basic human dignity values the peoples of the world today demand, and the more detailed standards specified with regard to each of these values exhibit all the precision and definiteness that rational application either permits or requires. The consequence is thus, as Dr. Garcia-Amador insisted, that continuing debate about the doctrines of the minimum international standard and equality of treatment has now become highly artificial;<sup>142</sup> an international standard is now authoritatively prescribed for all human beings. It does not follow, however, that these new developments in substantive prescription about human rights have rendered obsolete the protection of individuals through the traditional procedures developed by the customary law of the responsibility of states for injuries to aliens.

The notion, popularized by Vattel, that an injury to an alien individual is an injury also to the state of his nationality served as justification for the protection of the interests both of the state and of an important category of individuals in an epoch when the nation-state was often regarded as "the exclusive and sole subject" of international law. Even in a time, however, when more catholic conceptions of the subjects of international law prevail and individuals are being given more direct access to authoritative arenas for their self-protection, the historic remedy of state claim for the protection of the individual would not appear to have ceased to serve common interest.<sup>143</sup> Rather, the traditional channels of protection through a state,<sup>144</sup>

<sup>140</sup> *Id.* at 218.

<sup>141</sup> See notes 99-140 *supra* and accompanying text.

This conclusion might be reinforced by a comprehensive comparative study of internal constitutional developments about the world which create transnational expectations of authority. For development within the United States, see Gordon, note 16 *supra*. See also the other works cited in notes 14 and 16 *supra*.

<sup>142</sup> F. GARCIA-AMADOR, L. SOHN, & R. BAXTER, *supra* note 8, at 1-5; *Garcia-Amador's First Report*, *supra* note 8, at 199-203.

<sup>143</sup> The disappearance of the notion that states are the only appropriate subjects of international law need not becloud the facts of effective power that individuals sometimes need the support of their states to secure appropriate remedies against states and other entities.

For comprehensive and persuasive development of this theme, see Lillich, note 98 *supra*. See also Jessup, *Non-Universal International Law*, 12 COLUM. J. TRANSNAT'L L. 415 (1973).

<sup>144</sup> Koessler observed that "the gist of the institution of diplomatic protection" lies "in its remedial aspect rather than in the substantive character of the interest involved." "It is not," he continues, "because the protecting state feels offended by the wrong

together with the newly developed procedures under the contemporary human rights program of claim by individuals,<sup>145</sup> would appear to achieve a cumulative beneficent impact, each reinforcing the other, in the defense and fulfillment of the human rights of the individual. In recent times, individuals have in fact gained, for remedy of deprivations, either direct or derivative access to some transnational arenas of authoritative decision, such as the UN Commission on Human Rights (through the Sub-Commission on Prevention of Discrimination and Protection of Minorities),<sup>146</sup> the Committee on the Elimination of Racial Discrimination,<sup>147</sup> the Euro-

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done to one of its nationals, but in order to give the latter a workable substitute for the inaccessibility of an international forum, that the strong arm of the government is extended to the private interest. . . ." Koessler, *supra* note 40, at 181.

<sup>145</sup> See generally J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970); E. HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION (1970); M. MOSKOWITZ, INTERNATIONAL CONCERN WITH HUMAN RIGHTS (1974); C. NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); A. ROBERTSON, HUMAN RIGHTS IN THE WORLD (1972); UNITED NATIONS, UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, UN DOC. ST/HR/2 (1974); V. VAN DYKE, HUMAN RIGHTS, THE UNITED STATES, AND WORLD COMMUNITY 159-254 (1970); J. Jefferies, The Individual and International Law, 1954 (unpublished J.S.D. dissertation, Yale Law School); Capotorti, *The International Measures of Implementation Included in the Covenants of Human Rights*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 131-48 (A. Eide & A. Schou eds. 1968); Golsong, *Implementation of International Protection of Human Rights*, 110 HAGUE RECUEIL DES COURS 7 (1963); Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75-105 (M. Bos ed. 1973); Korey, *The Key to Human Rights Implementation*, 570 INT'L CONCILIATION (Nov. 1968); Schwelb, *Civil and Political Rights: The International Measures of Implementation*, 62 AJIL 827 (1968); Schwelb, *Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants*, in MÉLANGES OFFERTS A POLYS MONDINOS 270-89 (1968).

<sup>146</sup> See L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 739-856 (1973); UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS, *supra* note 145, at 177-84; Carey, *Progress on Human Rights at the UN*, 66 AJIL 107 (1972); Cassese, *The Admissibility of Communications to the UN on Human Rights Violations*, 5 HUMAN RIGHTS J. 375 (1972); Hoare, *The UN Commission on Human Rights*, in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 59-98 (E. Luard ed. 1967); Humphrey, *The Right of Petition in the UN*, 4 HUMAN RIGHTS J. 463 (1971); Humphrey, *The United Nations Commission on Human Rights and its Parent Body*, in 1 RENÉ CASSEN AMICORUM DISCIPULORUMQUE LIBER 103-13 (1969); Newman, *The New U.N. Procedures for Human Rights Complaints: Reform, Status Quo, or Chambers of Horror?*, in *Hearings on International Protection of Human Rights Before the Subcomm. on International Organizations and Movements of the House Comm. of Foreign Affairs*, 93d Cong., 1st Sess. 715-22 (1974); Schwelb, *Complaints by individuals to the Commission on Human Rights: 25 years of an uphill struggle (1947-1971)*, in THE CHANGING INTERNATIONAL COMMUNITY 119-39 (C. Boasson & M. Nurock eds. 1973); Van Boven, *The United Nations Commission on Human Rights and Violations of Human Rights and Fundamental Freedoms*, 15 NEDERLANDS TRIJDSCHRIJFT VOOR INTERNATIONAAL RECHT 374 (1968).

<sup>147</sup> The International Convention on the Elimination of All Forms of Racial Discrimination provides for individual petitions in Article 14, the first paragraph of which reads as follows:

A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State

pean Commission on Human Rights,<sup>148</sup> and the Inter-American Commission on Human Rights,<sup>149</sup> and such access promises to increase significantly in the future, especially as the Optional Protocol to the International Covenant on Civil and Political Rights comes into operation.<sup>150</sup> Yet the prospect of further direct access by individuals to authoritative arenas, though encouraging, remains far from adequate. As long as states remain the most important and most effective participants in transnational proc-

Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

UN HUMAN RIGHTS INSTRUMENTS, *supra* note 100, at 23, 27. The competence of the Committee regarding individual petitions is made operative "only when at least ten States Parties" have made the requisite declarations of acceptance. Art. 14 (9), *id.* at 28. This condition has to date not been fulfilled.

See *The Protection of Respect and Human Rights*, *supra* note 2, at 1082-86. See also N. LERNER THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 83-99 (1970); Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DENVER J. INT'L L. & POLICY 29, 58-64 (1971); Schwelb, *supra* note 125, at 1031-59.

<sup>148</sup> See European Convention on Human Rights, Arts. 25-32; BASIC DOCUMENTS, *supra* note 127, at 132-34.

See also R. BEDDARD, HUMAN RIGHTS AND EUROPE 50-85 (1973); F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 34-67 (1974); COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11-16 (1968); A. DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 68-121 (1971); J. FAWCETT, *supra* note 129, at 277-322; C. MORRISON, THE DEVELOPING EUROPEAN LAW OF HUMAN RIGHTS 60-98 (1967); A. ROBERTSON, HUMAN RIGHTS IN EUROPE 49-74 (1963); A. ROBERTSON, *supra* note 145, at 51-110; L. SOHN & T. BUERGENTHAL, *supra* note 146, at 1008-50, 1091-99; G. WEIL, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 90-143 (1963); Golsong, *The Control Machinery of the European Convention on Human Rights*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 99, at 38-69; McNulty, *The Operation and Effectiveness of the European Convention on Human Rights*, 3 U. SAN FRANCISCO L. REV. 228 (1969); McNulty's *Stock-Taking 1974*, note 128 *supra*; Schwelb, *On the Operation of the European Convention on Human Rights*, 18 INT'L ORG. 558 (1964); Waldock, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 34 BRIT. Y.B. INT'L L. 356 (1958). Cf. also 25th Anniversary of the European Convention on Human Rights, 8 HUMAN RIGHTS J. 325 (1975).

<sup>149</sup> See A. SCHREIBER, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 41-56 (1970); SECRETARIAT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS, 1960-1967, at 10-11 36-39, 52-54 (1972); Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AJIL 828 (1975).

<sup>150</sup> The Optional Protocol to the International Covenant on Civil and Political Rights provides for individual petitions ("communications from individuals") and related procedures to make the protection stipulated in the Covenant more effective. It was adopted and opened for signature, ratification, and accession under UN General Assembly resolution 2200A (XXI) of December 16, 1966, along with the two Covenants. For its text, see UN HUMAN RIGHTS INSTRUMENTS, *supra* note 100, at 15-17. The Op-Protocol has already received more than the 10 ratifications or accessions needed for becoming operative. See E. Schwelb, *Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, *infra* p. 511.

esses of decision, espousal of claims by states for deprivations suffered by individuals would appear indispensable to full protection. Remedy through claim by a protecting state and through individual petition need not be mutually incompatible; they can be made to reinforce each other for the better defense and fulfillment of the human rights of the individual.<sup>151</sup>

#### IV.

##### THE FUTURE OF PROTECTION

The future development of the world community will provide the context the characteristics of which are decisive for the conception of an alien and therefore for all prescriptions that relate to "protection" or "discrimination." In political terms an alien is an outsider, a nonmember of the state whose policies are under consideration. As we have seen, it has long been regarded as permissible for state policy to erect certain barriers against nonmembers. At the same time various limitations have been applied to discriminatory activity. Sharply contrasting policies and factual circumstances have tended to sustain ambiguities of legal doctrine in regard to aliens. In preceding sections we have demonstrated how these ambiguities can be coped with on behalf of preferred policy. Questions remain about the probable future interplay of fact and doctrine in this significant area.

If we extend current trends into the future the prediction is warranted that after an interval in which the protection of aliens remains in jeopardy, the direction of evolution will change as many conditioning factors that sustain discrimination are weakened. We refer, for example, to the jeopardy in which individuals and corporations often find themselves in former colonial countries. Up to this time policies of discrimination have not exhausted the reservoirs of resentment that accumulated during the period of colonial subordination and of post-colonial disappointment with the immediate fruits of independence. The initiative will continue to be taken by members of the national elite who are seeking to supplant alien interests in order to consolidate control by local capitalists. Where socialist ideology is strong, the active mobilizers of anti-alien sentiment are typically recruited from among the political elites whose members are determined to do away with and to preclude outside competition for effective control of national resources. Whether the anti-alien leaders are entirely political, or constitute a coalition of political and economic forces, their strategy will be to keep

<sup>151</sup> Cf. McDougal, Lasswell, & Chen, *supra* note 1, at 993-98.

It has often been alleged, perhaps with some accuracy, that the doctrine of responsibility of states has been abused. Insofar as these complaints are appropriately directed to the use of force as a means of self-help ("the gunboat policy"), they may be justified. Insofar as they relate to third-party decisionmaking, they have no validity. In the words of Lillich: "While it is true that 'the ideas of justice and fair dealing incorporated in the accepted norms of conduct for European nations were carried over into the wider sphere of the international society of the nineteenth century,' there is no need to apologize for attempting to establish a universal consensus behind justice and fair dealing." Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 327-28 (1967).

alive among the rank and file of the population sentiments that enabled the anti-imperialist, pro-independence movement to succeed.

As time passes many changes are likely to occur in the strength of the factors that support extremist measures against aliens. It will be increasingly evident to widening circles of leaders and the led that an unlimited anti-alien policy does not yield net advantages; that, in fact, in their own history there never was a totally anti-alien policy. Concessions are typically made at successive stages of an independence movement to foreign interests from which political, economic, and other forms of assistance were (and are) sought. These adjustments may be made to rival socialist or liberal, totalitarian or moderate, blocs. The stronger powers among former colonies also find themselves granting assistance to weaker members of the successor communities and insisting that reciprocal obligations be lived up to. In this way they reinstate the confrontations that originally led the stronger states to follow a policy inspired by Vattel (which, of course, they did not need to learn from a scholar). If the stronger among the successor powers share a common ideological orientation, synonyms will be used in order to avoid stigmatizing a fellow ideologist as an "alien." Since the external relations of every successor power are not likely to be entirely restricted to an ideological bloc, situations can be expected to arise in which the traditional language of international law will seem more effective than alternatives.

Many occasions for advancing claims on behalf of aliens will be but trivially related to economic affairs. The emerging code of human rights provides a set of standards that apply to every sector of human interaction. If we postulate that global connections will continue to gain intensity, emerging networks of association will cover more people, more localities, and more pluralization. To an increasing extent the protection of aliens will be taken for granted.

If we accept the scenario of accelerating interdependence, we must be prepared for a zig-zag evolution of policies toward nonmembers of the principal bodies politic. A key problem is whether the major political divisions of the globe will continue to be perceived by enough influential members as a sufficiently important means by which net advantages can be obtained at the expense of nonmembers. It is reasonable to assume that coalitions will arise which expect to reap benefits from governmental policies that impose substantial deprivations on nonmembers. Such expectation will take advantage of the reappearance of conditioning factors that have fostered these results in the past. Lurking in the background of individuals who have not been socialized to identify fully with the world community is "fear of the stranger"; and this is often focused on nonmembers of the principal body politic (the state). From one situation to the other an "alien" may be stigmatized with every identifying symbol that has a negative cathexis (racial, religious, and so on). Recent environmental circumstances may have contributed to the level of unrest generated by realized or anticipated value deprivations (political, economic, and so on). Impulses that contribute to unrest are available for displacement on

such public targets as aliens. In our interactive world it is to be assumed that counterpolicies will be mobilized on behalf of the alien. In consequence, extremes of policy may be mitigated while expectations are strengthened that the prescriptive code that requires the protection of aliens is, indeed, enforceable. Barring drastic contingencies, the probability is that the code of human rights will be progressively refined in harmony with the policies necessary to protect aliens as full members of the world community.